

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEVIE WILLIAMS,

Defendant-Appellee.

UNPUBLISHED
December 9, 2003

No. 244652
Wayne Circuit Court
LC No. 96-002162

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order granting the motion of defendant Levie Williams for relief from judgment on the basis of newly discovered evidence. In 1996, a jury convicted Williams of two counts of first-degree felony murder,¹ two counts of first-degree premeditated murder,² two counts of armed robbery,³ assault with intent to murder,⁴ and possession of a firearm during the commission of a felony.⁵ The sentences for the first-degree premeditated murder convictions and armed robbery convictions were merged into the felony murder sentences. The trial court sentenced Williams to concurrent terms of natural life for the first-degree felony murder convictions and 20 to 30 years' imprisonment for the assault with intent to murder conviction, all to be served consecutively to the two-year sentence for the felony-firearm conviction. We reverse and remand for consideration by a different judge.

¹ MCL 750.316(1)(b).

² MCL 750.316(1)(a).

³ MCL 750.529.

⁴ MCL 750.83.

⁵ MCL 750.227b.

I. Basic Facts And Procedural History

A. The Original Trial And Appeal

(1) Overview

This case arose out of the shootings of two men and one woman in a crack house in Detroit on February 17, 1996. The woman, Gail Thomas, survived and testified against Williams at trial.

(2) Other Testimony

The critical testimony at trial was that of Gail Thomas. However, for purposes of completeness, we briefly summarize the testimony of other key witnesses. Bader Cassin, an expert in the field of forensic pathology, testified that he conducted the autopsies of the victims, Kevin Tate and Anthony Nathaniel. Cassin stated that Tate died of two gunshot wounds to the head, both entering above the right ear. Nathaniel died of two gunshot wounds, one to the face and one to the chest. Cassin testified that alcohol and cocaine were present in Tate's body at the time of death, and alcohol was present in Nathaniel's body at the time of death. Cassin stated that cocaine is depleted from the body more quickly than alcohol.

Marion Tate, Kevin Tate's mother, testified for the defense. According to Marion Tate, she was babysitting for Dana Bonner at Bonner's house when Thomas called them at about two or three in the morning of February 17. According to Marion Tate, Thomas told her that she, Kevin Tate, and another man had been shot. Marion Tate did not think that Thomas talked to Bonner on the phone. Thomas told her that "Martel", which was the name she knew Williams by, had committed the shooting. Marion Tate then testified that she told the police officers that Thomas had told her that "Parnell" had committed the shooting. Marion Tate stated, however, that she just got the names mixed up.

Viola Williams, the mother of Williams, testified for the defense that in the early morning of February 17, she was asleep in her bed and she heard the side door open and that only her children have a key to the door. According to Viola Williams, in the morning Williams, as well as the rest of her children, were home.

Bryant Williams, the brother of Williams, testified for the defense that in the early morning hours of February 17, Williams called and told him that he was on his way home. According to Bryant Williams, Williams got home at 2:50 a.m. and they watched television until Williams fell asleep. Bryant Williams stated that he woke Williams up and sent him to bed where he spent the rest of the night.

(3) Testimony Of Gail Thomas

Gail Thomas testified that she was thirty-three years old, had been convicted of car theft, and was staying at 12027 Strasburg on February 17, 1996. Thomas stated that she was smoking marijuana at that time and that people bought and sold crack cocaine at that address. Thomas knew Tate as a friend for six years but did not know Nathaniel. She knew Williams as "Martel" or "Marcel." According to Thomas, Williams had been coming to the Strasburg house for the

last six months to buy drugs every day or every other day. Thomas testified that at 3:00 a.m. on February 17, she was lying down in the back bedroom watching television while Tate slept in the other bed when she heard knocking on the front door. Williams was at the door with Nathaniel. Nathaniel was in front with Williams standing behind him. She opened the door and the two men came inside.

According to Thomas, when she turned around from locking the door, she saw that Williams had drawn a gun. Williams told her to step to the side and told Nathaniel to take off his coat. Nathaniel handed the coat to Williams who then told them both to go in the back. According to Thomas, they all went into the back bedroom where she woke up Tate and told him "we're being robbed." Williams demanded that Tate hand over money and drugs. Tate took \$30 and rocks of cocaine out of his pocket and gave it to Williams; Thomas acknowledged, however, that she testified at the preliminary examination that there were no drugs and no money in the house on February 17.

According to Thomas, Williams then demanded that Nathaniel give him his jewelry and wallet. Nathaniel gave defendant a watch, ring, necklace and wallet. Thomas stated that Williams told her to disconnect the phone, which she did. Thomas testified that Williams told her to take the cord off the phone, which she did, and that she then tied Tate's hands up in the front with the cord as Williams instructed her. Thomas stated that she then took the extension cord from the television and handed it to Nathaniel and Nathaniel tied Thomas's hands up in the front, all upon instructions from Williams.

Thomas got back on the bed and Williams told her and Tate to lie down and pull the blankets over their heads, which they did. Thomas testified that she heard what sounded like the pulling of shoestrings out of a shoe and then she heard something going on between Nathaniel and Williams. Thomas heard footsteps leaving the room and then the room became quiet. Thomas testified that she heard footsteps moving around the house and then heard Nathaniel run out of the room. Thomas stated that she heard someone say, "didn't I tell you to lay down and don't move?" According to Thomas, Nathaniel then said, "please, man, don't hurt me."

Thomas testified that Nathaniel was brought back in the bedroom and she could hear him being placed on the floor. Thomas and Tate told Nathaniel, "just be cool, don't, everything is going to be all right, he's going to leave." According to Thomas, Williams went out of the room and it was quiet for about five minutes but Nathaniel then jumped up and ran out of the room again. She stated that she heard Williams say, "didn't I tell you don't move, I'm going to shoot your ass." Thomas heard a scuffle, heard something being hit with a blunt object, heard Nathaniel scream, and then heard gunshots.

Thomas testified that, following the gunshots, it was quiet for forty-five seconds to a minute, that she heard footsteps coming towards the room, and that she heard two gunshots in the room. According to Thomas, she could feel something on her head, then she felt the gunshot, and then she lost consciousness. Thomas testified that when she regained consciousness about five to ten minutes later, the clock read 3:30 a.m. Thomas stated that she knocked the blanket off of her head with her shoulder, wiggled her hands out of her bindings, and checked on Tate. She saw he was bleeding and that he would not move. According to Thomas, she took the telephone cord off his hands, plugged in the telephone, called 911, ran into the front room, saw Nathaniel, and then paused and ran out the side door and down the street for help, leaving EMS on the line.

According to Thomas, she went five houses down to where Tate's mother and aunt lived, got Ron Singleton, and returned to the house. Thomas talked to the officers at the scene, then went downtown to the Homicide Section. When Thomas' eyes rolled back in her head while she was talking to the detectives, she was taken to the hospital where it was discovered that she had been shot. A bullet was removed from her head. While she was in the hospital, the police came by with six photographs out of which she picked Williams. She described Williams to the police as "slim, kind of tall, about five-six, short hair, and he had on a starter jacket, turquoise starter jacket, blue jeans and red boots or shoes." She told the police that Marion Tate, Dana Bonner and everybody in the neighborhood knew who Williams was.

Thomas testified on cross-examination that she regularly used marijuana and cocaine. She stated that on the night of February 16, she drank three forty-ounce beers with Tate and smoked two joints. She acknowledged, however, that she stated at the preliminary examination that she had not smoked marijuana on that date. She stated that neither she nor Tate used cocaine that night. She also stated that she assumed the knock at the door was people wanting to buy drugs. She further stated that she told only Ron Singleton what happened before she told the police, but then she said that she told Marion Tate as well. Thomas said she did not call Marion Tate and did not talk to her about the shootings before she saw Marion Tate outside the house when the police arrived.

Thomas testified that Dana Bonner was a friend of hers and a friend of Tate's. Thomas denied that Bonner supplied drugs to Tate or that Williams owed Bonner money. Thomas said that she did not call Bonner or Marion Tate after the shooting. Thomas acknowledged that Bonner and Marion Tate were already outside of the house when the police arrived, but claimed not to know how Bonner came to be there even though Bonner lived about ten blocks away. After Thomas completed her testimony, medical records were admitted which indicated that a bullet was removed from Thomas' head and that she had cocaine in her system at the time she was hospitalized.

After intervening testimony, the defense recalled Thomas to the stand. Thomas stated that she last used cocaine before the shooting on February 15, 1996. She then stated that she did call Marion Tate and told her about the shooting in the early morning hours on February 17. She stated that she remembered calling Marion Tate when she was outside the courtroom talking to Marion Tate. Thomas acknowledged that she did not tell the truth on direct examination. She stated that she called EMS first and then she called Marion Tate; but then stated that she called Marion Tate *before* she called EMS. She said she called Marion Tate at Bonner's house because she knew Marion Tate was babysitting there. Thomas denied calling Bonner to tell her there was a robbery. Thomas reaffirmed her earlier testimony that she did not ingest any cocaine the night before the shooting or the morning of the shooting.

Marion Tate was then questioned by the trial court outside the presence of the jury and stated that she did not talk to Thomas outside the courtroom. The trial court then recalled Thomas. Thomas stated that she talked to Marion Tate about the phone call after Marion Tate testified. However, Marion Tate testified that Thomas was not talking to her; she was "just talking."

(4) The Jury Verdict And The Original Appeal

The jury convicted Williams on all counts. Williams appealed as of right from his convictions and this Court affirmed in an unpublished, per curiam opinion. The Michigan Supreme Court denied leave to appeal.⁶

B. The Motion For Relief From Judgment

In February 2000, Williams filed a motion for relief from judgment, in part on the basis of newly discovered evidence. This evidence was an affidavit by Santo Taylor, who claimed that another man committed the crimes for which Williams was convicted and that Taylor witnessed the events. The trial court denied the motion. Williams filed an application for leave to this Court, and, in lieu of granting leave, we remanded the case to the trial court for an evidentiary hearing on the claim of newly discovered evidence.

C. The Hearings

The trial court conducted a hearing on September 4, 2001, at which Santo Taylor testified. Taylor claimed that he first met Williams at the Ryan Correctional Facility in 1999, where Taylor was imprisoned for a conviction of assault with intent to commit murder. Taylor acknowledged that he was “kind of” convicted of larceny when he was twelve years old, resulting from his stealing “some stuff out of an appliance store,” but claimed he had no other convictions since then. Taylor further acknowledged that there may be retaliations in prison for testifying truthfully and placing the blame for the shootings on someone else. Taylor stated that he signed the affidavit on January 5, 2000, because he knew the “real man that they had in there wasn’t the person who did it.” Taylor denied that he knew Williams prior to prison or that he was being given any favors for his testimony.

Taylor claimed that on February 17, 1996, he bumped into Javell Scott (also known as “Viper”) and they went to “get some weed to smoke, you know, some drink” at the liquor store. Viper hollered at “this girl,” who he later claimed was Gail Thomas. She came over and sat in the back seat of their car. Viper asked her “what’s up with this money you owe me or whatever,” and she responded that she was going to take care of him. She wrote down a number and told Viper to call her later, stating that she knew “this guy [who has] some money, some drugs or whatever.” Taylor testified:

Then, so, we drove by the house where she said this money was so-called supposed to be here, so we dropped her off. After that she said, you give me a call later on and I’ll let you know if everything’s all right. So then I dropped her off and then me and Viper, we smoking weed and all this stuff. She was still in the car then because we went to Chandler Park to hang out for a little bit, and then after that we dropped her off.

⁶ *People v Williams*, 460 Mich 874; 601 NW2d 107 (1999).

Then I dropped Viper off at his place I guess he was staying at, and then came back, told me to pick him up at the Black Bottom Lounge. And then I came by later on, it was little late, everybody was moving out.

Q. About what time is this?

A. Probably around two.

Q. In the afternoon?

A. No, at night.

Q. In the morning.

A. In the morning, yes, in the morning. [¶] And then, so I waited, he came out. He made a phone call on the pay phone and then came back to the car and was like, it's on. So we went back to the house where she said this guy was supposed to be at. I stayed in the car, he stepped out.

Q. Who stepped out?

A. Viper did. He went to the side of the house, went inside the house.

* * *

A. And then I was waiting out there listening to music for about 15, 20 minutes. You know, I'm kind of antsy, I didn't want to sit here, so I got up to go see what was going on. And then when I went to the back, I seen the door open, I heard some scuffling. So then when I went into the kitchen, then I seen two people scuffling, then I heard some shots fired and I took off running out the back door. [¶] And that was it, I hid out for the night.

When asked if he saw anyone get shot in the house, Taylor responded yes. When asked who he saw get shot, Taylor responded that "[t]here was a guy standing outside the door when I pulled up, and it looked like it was pretty much him." Taylor further explained that Viper was scuffling with the guy who was outside the door, and that Viper (who had his back facing Taylor) shot this person "somewhere up in the chest area," although Taylor stated that he did not see the wounds. After Taylor saw the man fall down, he exited the house and left in his car.

Taylor claimed that he "bumped into" Viper five days later. Taylor claimed that he asked Viper about what happened and what they were going to do, and that:

And [Viper] was like, oh, everything is all right. And he was like – I asked him what happened, whatever. He was like, I ended up shooting a couple more people or whatever. And then he was like – so I was like, what should we do, man, should we, you know, turn ourselves in or whatever, you know, because of Gail. And he was like, yeah, I hit her upside the head, whatever, with the gun, and tried to make it look good, you know what I'm saying, the gun went off and stuff.

Defense counsel clarified that Viper told Taylor that he hit Gail Thomas to give her a wound “so that it would take suspicion away from her” and “look like she was attacked, too, by the killer” when in fact, this was not true because “she was in with the killer.”

Taylor further claimed that he returned to the drug house about five months later and he bumped into a person from whom he used to purchase marijuana, who told him that his cousin got killed “over here” and that he was not going to sell “around here.” This person also told Taylor that “this lady said that this guy who killed his cousin was name Levie, like the blue jeans.” While Taylor was in prison, he heard guys yelling the name Levie which caused Taylor to wonder if this person was from the east side. Taylor explained:

. . . so I asked him if he was from the east side around, you know, the Six Mile and Gratiot area, and he said he was from that area. [¶] And then I informed that I had information about, you know, this case, I brung up little parts. I asked him, you know, if he knew about a shooting. He was like, yeah, that’s what I’m in here for, that’s what they said I did or whatever. And I was like, man, I was there. And then I sat back and I was just thinking about it in my room, should I, you know come forward or should I just let it go. Because I was in, you know, I didn’t want any more time being put on me or whatever. I mean, I got a lot of time, but a reasonable out date at least.

Taylor claimed that a person in the law library typed his affidavit, which Taylor then read into the record. In his affidavit, Taylor stated that Gail Thomas and Viper began to argue about “the rest of the money and stuff” after the man in the kitchen was shot and just before Taylor fled from the house.

On cross-examination, Taylor acknowledged that he had spoken to Williams before he prepared his affidavit, but he denied that they planned his story. Taylor also acknowledged that Williams had a scene sketch of the house and a big folder of information related to the case. Taylor denied participating in planning the robbery or the murder, or in the shooting at the house, but believed that he could be charged “with it all” because he was present. However, he did not believe that he could be charged with anything for his actions on the night in question, explaining that he “got better educated” at the law library. According to Taylor, he researched this issue before he wrote the affidavit, and admitted that he probably would not have written the affidavit if he could be charged.

When asked whether he had been offered to take a polygraph test, Taylor explained that “homicide detectives” came to the Ryan facility and asked him if he was willing to take one and that he told them he would be. However, Taylor claimed that “he never heard nothing pertaining to this until now.”

At a hearing on September 13, 2001, Taylor was momentarily returned to the witness stand. The trial court asked him if his research was wrong, whether he would change any portion of his story. Taylor responded no, although the trial court and the prosecution later stated that Taylor hesitated before he answered.

D. The Trial Court's Decision And The Subsequent Appeals

The trial court found Taylor's testimony credible, granted the motion for relief from judgment, and ordered a new trial. The prosecution filed an application for leave to appeal which this Court denied. The prosecution then appealed to the Michigan Supreme Court which vacated the trial court's order granting a new trial and remanded the case to the trial court for reconsideration of the motion for relief from judgment. The Michigan Supreme Court directed that the trial court apply the standards set forth in MCR 6.508(D) in rendering its decision on defendant's motion for relief from judgment.⁷

E. The Trial Court's Opinion

In October of 2002, the trial court issued its opinion granting a new trial. The trial court noted that it had previously found Taylor to be credible after hearing his testimony, that his testimony directly conflicted with the testimony of Thomas, and that "[s]hould the trier-of-fact believe the testimony of Mr. Taylor over that of Ms. Thomas, the outcome of the trial would have been vastly different." The trial court therefore granted a new trial "in order to allow the finder-of-fact an opportunity to compare the version of events from Ms. Thomas with those of Mr. Taylor and render a verdict in keeping with the testimony it finds most credible." The prosecution filed an application for leave to appeal which this Court granted.

II. MCR 6.508

A. Overview

It is well settled that:

Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing postappeal relief from a criminal conviction. The subchapter is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process. Relief, however, may not be granted unless the defendant demonstrates (a) good cause for failure to have raised the grounds for relief on appeal or in a prior motion under the subchapter and (b) actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b).^[8]

Here, Williams seeks relief from judgment within the scope of MCR 6.500 *et seq.*

B. The Language Of MCR 6.508

MCR 6.508 is phrased in the negative and sets out three bars to relief from judgment. The first bar, under MCR 6.508(D)(1), is that a court may not grant relief from judgment if the criminal defendant's motion seeks relief from judgment of conviction and sentence that still is

⁷ *People v Williams*, 466 Mich 851; 642 NW2d 681 (2002).

⁸ *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992).

subject is to challenge on appeal under MCR 7.200 or MCR 7.300. This bar is not applicable here; Williams’ judgment of conviction and sentence is not now subject to challenge on appeal pursuant to MCR 7.200 or MCR 7.300.

The second bar, under MCR 6.508(D)(2), is that a court may not grant relief from judgment if the criminal defendant’s motion alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under MCR 6.500, “unless the defendant establishes that a retroactive change in the law has undermined the prior decision.” This bar is also not applicable here; Williams’ motion did not allege grounds that were decided against him in a prior appeal or proceeding under MCR 6.500.

The third bar, under MCR 6.508(D)(3), is that a court may not grant relief from judgment if the criminal defendant’s motion “alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under” MCR 6.500. This bar clearly applies here as Williams could have, but did not, raise the issue of the newly discovered evidence in a prior motion. However, a criminal defendant can avoid the application of this bar if that defendant demonstrates:

- (a) good cause for failure to raise such grounds on appeal or in the prior motion; and
- (b) actual prejudice from the alleged irregularities that support the claim for relief.^[9]

The rule then defines “actual prejudice”:

- (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;^[10]

* * *

- (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.^[11]

* * *

The court rule also provides that the criminal defendant has the burden of establishing entitlement to the relief requested and that the court may waive the “good cause” requirement of MCR 6.508(D)(3)(a) if there is a significant possibility that the defendant is innocent of the

⁹ MCR 6.508(D)(3)(a), (b).

¹⁰ MCR 6.508(D)(3)(b)(i).

¹¹ MCR 6.508(D)(3)(b)(iii).

crime.¹² Here, the trial court, although not using the phrase “good cause,” found that Williams “[h]aving just become aware of the existence of the witness . . . could not have raised the issue presented here in his previous motion to the Court of Appeals or the Michigan Supreme Court thus satisfying MCR 6.508(D)(3)(b).” Further, the trial court, noting that Williams asserted that he suffered “actual prejudice” to his case because the newly discovered witness testimony would have provided him a reasonably likely chance of acquittal, found that this assertion “satisfies MCR 6.508(D)(3)(b).” The next step in our analysis, therefore, is our consideration of the standard against which we review these findings as well as the factual findings, if any, of the trial court.

III. Standard Of Review

A. Overview

It is well established that we review a trial court’s grant of relief from judgment for an abuse of discretion¹³ and that we review a trial court’s findings of fact supporting its ruling for clear error.¹⁴ There are, however, a number of complexities underlying these concepts. The first such complexity occurs at the threshold and relates to the proper order in which we are to conduct this bifurcated inquiry. In some instances, statutory language and case precedent set the order; when reviewing a trial court’s decision to sentence a minor as a juvenile or as an adult, for example, the appellate court first reviews the trial court’s findings of fact for clear error and then reviews the ultimate decision for an abuse of discretion.¹⁵ While there is no similar statutory direction when dealing with our review of a trial court’s grant of relief from judgment, we believe that simple logic requires us first to consider a trial court’s findings of fact and then to consider that court’s ultimate decision.

B. Reviewing A Trial Court’s Findings For Clear Error

The second complexity relates to the “clearly erroneous” standard, one that is “easier to cite than to explain.”¹⁶ The classic formulation is that a trial court’s findings of fact are clearly erroneous “if, after a review of the entire record, the appellate court is left with a definite and

¹² MCR 6.508(D).

¹³ *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001) (“A trial court’s grant of relief from judgment is reviewed generally for an abuse of discretion,” citing *People v Osaghae*, 460 Mich 529, 534; 596 NW2d 911 (1999) and *People v Reed*, 198 Mich App 639, 645; 499 NW2d 441 (1993), aff’d 449 Mich 375; 535 NW2d 496 (1995)).

¹⁴ MCR 2.613(C). See also *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

¹⁵ See *People v Thenghkam*, 240 Mich App 29, 41-42; 610 NW2d 571 (2000), overruled in part on other grounds in *People v Petty*, 469 Mich 108; 665 NW2d 443 (2003). See also *People v Launsbury*, 217 Mich App 358, 362; 551 NW2d 460 (1996), *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994), and *People v Passeno*, 195 Mich App 91, 103; 489 NW2d 152 (1992), overruled in part on other grounds in *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).

¹⁶ *Thenghkam*, *supra* at 43.

firm conviction that a mistake has been made.”¹⁷ This formulation derives from *United States v United States Gypsum Co.*,¹⁸ but in that case the United States Supreme Court “did little more than announce the ‘firm and definite conviction’ slogan without a great deal of elucidation.”¹⁹ Nonetheless, in Michigan we have derived two general principles from *Gypsum*. The first is that reviewing courts give “less deference to the factual findings of trial judges than to the factual findings of juries, even though the trial court’s findings still have ‘great weight.’”²⁰ The second is that “a trial court’s factual findings may be clearly erroneous even when there is some evidence to support them.”²¹ As this Court stated in *Thenghkam*:

There are occasions, albeit relatively infrequent ones, when a trial court’s assessment of those facts suffers from some shortsightedness. . . . In those circumstances where the trial court’s findings do not accurately portray the factual background of the case, we conclude that the trial court “clearly erred.”^[22]

Overall, the clear error standard of review is highly deferential to the trial court; indeed, MCR 2.613(C) requires that regard be given to the “special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.” However, “[t]he important lesson of *Gypsum* is that appellate courts need not refrain from scrutinizing a trial court’s factual findings, nor may appellate courts tacitly endorse obvious errors under the guise of deference.”²³

Thus, here we must scrutinize the trial court’s findings and, while according those findings due deference as required by the court rule, we are not to tacitly endorse obvious errors, or omissions, under the guise of that deference.

C. Reviewing A Trial Court’s Ultimate Decision For An Abuse Of Discretion

The third complexity relates to the abuse of discretion standard. It is perhaps helpful to think of this standard as a spectrum. The most deferential end of that spectrum is the formulation contained in *Spalding v Spalding*,²⁴ which states that an abuse of discretion occurs when the lower court’s decision is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” Under this formulation, an appellate court is

¹⁷ *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

¹⁸ *United States v United States Gypsum Co.*, 333 US 364; 68 S Ct 525; 92 L Ed 746 (1948).

¹⁹ *Thenghkam*, *supra* at 44-45.

²⁰ *Id.* See also *Brady v Michigan Consolidated Gas Co.*, 31 Mich App 498, 499 n 1; 188 NW2d 58 (1971) (Michigan’s appellate courts traditionally exercise a broader review of a judge’s decision than of jury verdicts).

²¹ *Thenghkam*, *supra* at 45.

²² *Id.* at 46, citations omitted.

²³ *Id.* at 47.

²⁴ *Spalding v Spalding*, 355 Mich 382, 384-85; 94 NW2d 810 (1959).

almost required, in order to reverse a trial judge's discretionary decision, to conclude that the judge literally had taken leave of his or her senses.

At the other end of the spectrum is the considerably less deferential formulation of the abuse of discretion standard contained in the recent case of *People v Babcock*.²⁵ There, Justice Markman, writing for the majority, analyzed the abuse of discretion standard:

At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. See *People v Talley*, 410 Mich 378, 398; 301 NW2d 809 (1981) (Levin, J., concurring), quoting *Langes v Green*, 282 US 531, 541; 51 S Ct 243; 75 L Ed 520 (1931) (“The term “discretion” denotes the absence of a hard and fast rule.”). When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court’s judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. See *Conoco, Inc v JM Huber Corp*, 289 F3d 819, 826 (CA Fed, 2002) (“Under an abuse of discretion review, a range of reasonable determinations would survive review.”); *United States v Penny*, 60 F3d 1257, 1265 (CA 7, 1995) (“a court does not abuse its discretion when its decision ‘is within the range of options from which one would expect a reasonable trial judge to select’”) (citation omitted).^[26]

However, *Babcock* interpreted a statute and not a court rule; further, that statute dealt with sentencing. We conclude that if there is to be a decision to expand this formulation of the abuse of discretion standard beyond the statutory context of sentencing, that decision is appropriate for the Supreme Court and not this Court.

Fortunately, there is a formulation of the abuse of discretion standard that is in the middle of the spectrum. Under this formulation, an abuse of discretion can be found only where an unprejudiced person considering the facts on which the trial court relied would find no justification or excuse for the ruling made.²⁷ In this regard, we note that a trial court’s misapplication or misunderstanding of the law in reaching its decision also may constitute an abuse of discretion by a trial court.²⁸ It is this formulation that we consider to be appropriate for our review of the trial court’s ultimate decision in this case.

²⁵ *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

²⁶ *Id.* at 269.

²⁷ *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

²⁸ *People v Cress*, 250 Mich App 110, 149; 645 NW2d 669, rev’d on other grounds, 468 Mich 678; 644 NW2d 174 (2003).

IV. The Trial Court's Findings

A. Findings As To MCR 6.508(D)

We first note that the trial court made what are in essence two sets of findings in its opinion. The first set relates to the requirements of MCR 6.508(D). The trial court found that Williams' assertions in his motion for relief for judgment were sufficient to satisfy the "good cause" and "actual prejudice" requirement of MCR 6.508(D)(3). As we have outlined above, subsection (3) of the rule sets a bar for a criminal defendant who "alleges" grounds for relief that could have been raised on appeal or in a prior motion. In this context, the word "allege" is virtually synonymous with the word "assert." We do note, however, that subsection (3) goes on to require that such a criminal defendant "demonstrate" good cause and actual prejudice. If the trial court's somewhat cryptic language in this regard means that it found that Williams had met the MCR 6.508(D)(3)(a) and (b) requirement that he *demonstrate* good cause and actual prejudice merely by *asserting* that such good cause and actual prejudice existed, we disagree. Given our holdings below, however, we need not reach this matter.

B. The Trial Court's Factual Findings

The trial court's second set of findings were, at least in part, factual:

- "The testimony of Santo Taylor is in direct conflict with the testimony of Gail Thomas." This finding was correct.
- "Mr. Taylor gives testimony which would make both Thomas and himself subject to prosecution for robbery and murder." This finding was correct.
- "Mr. Taylor's version of events also gives Ms. Thomas a motive to lie about the reason for her known presence in the house, which was established by testimony at trial." This finding was correct.
- "After hearing the testimony of Mr. Taylor, the court found him to be credible."
- "Should the trier-of-fact believe the testimony of Mr. Taylor over that of Ms. Thomas, the outcome of the trial would have been vastly different."

With respect to the trial court's credibility finding, the prosecution asserts that the trial court erred by not looking more critically at Taylor's testimony and cites the inherent unreliability of a jailhouse affidavit. While in the abstract we might agree, issues of credibility are best left to the trier of fact, in this instance the trial court, and we decline to reverse the trial court's decision on this issue.

However, as to the trial court's finding regarding the reasonably likely chance of acquittal, we conclude that the trial court did not, in fact, make such a finding. First, the trial court conflated a *future* event—a trier-of-fact's belief of the testimony of Taylor over that of Thomas in a future trial—with a *past* event—the outcome in the past trial. The trial court's reasoning is, therefore, circular. As a result, the trial court avoided the task the Supreme Court imposed upon it: to apply the standards set forth in MCR 6.508(D) in rendering its decision on

Williams' motion for relief from judgment. The trial court did not apply the standard in MCR 6.508(D)(3)(b)(i). Rather, the trial court conditioned its finding upon an event that had not yet occurred.

Second, even if this were a grammatical rather than a logical error, the trial court's finding on this point would still have sidestepped the requirements of MCR 6.508(D)(3)(b)(i). What purports to be a finding is, on closer examination, a conditional statement that becomes, if one accepts the premise, a tautology: *if* the jury had believed Taylor's testimony, *then* the outcome of the trial would have been vastly different. This goes without saying, and sheds no light on the question the trial court was required to answer, either in the negative or the affirmative: had the trier of fact heard Taylor's testimony, *was* Williams reasonably likely to have been acquitted?

In sum, the trial court's responsibility was to make a finding that Williams had demonstrated that, had the newly discovered evidence contained in Taylor's testimony been available at the trial, Williams would have had a reasonably likely chance of acquittal. The trial court made no such finding. We conclude that this was an obvious error.

V. Abuse Of Discretion

Under the abuse of discretion formulation upon which we rely, we are to determine whether an unprejudiced person considering the facts on which the trial court relied would find no justification or excuse for the ruling made. In this regard, a trial court's misapplication or misunderstanding of the law in reaching its decision may constitute an abuse of discretion. Here, we conclude that the trial court either misapplied or misunderstood the law. As we have determined above, the trial court simply did not apply the standard in MCR 6.508(D)(3)(b)(i) because it did not make an unconditional finding that, had Taylor's testimony been available at the trial, Williams would have had a reasonably likely chance of acquittal. The trial court therefore did not comply with the Supreme Court's direction in its remand. This, we conclude, was an abuse of discretion.

VI. Conclusion

This case has twice been remanded to the trial court. Another remand to the same judge would not be in the interests of judicial economy. We therefore reverse and remand for consideration by a different judge. That judge shall, in conformity with the Supreme Court's directions and with the holdings in this opinion, determine: (a) whether Williams has demonstrated, rather than merely asserted, good cause for failing to raise his grounds for relief from judgment on appeal or in a prior motion and (b) whether Williams has demonstrated, rather than merely asserted, actual prejudice by showing that, had Taylor's testimony been available at the trial, Williams would have had a reasonably likely chance of acquittal.

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Michael J. Talbot

/s/ Brian K. Zahra